That Sonia Sotomayor may become the first Latina Supreme Court justice will have major impact, if not directly on the Court’s decisions, surely on the Court’s deliberations on such decisions. Undoubtedly, however, it will have a lasting and irreversible impact on the civic identity of Latinos/a in the U.S. Latino/as have had a long and complicated relationship with the United States that has led to both a feeling of and de facto living a second-class citizenship. Even as recently as 2005 a policy trendsetter and Washington insider Samuel P. Huntington advanced the theory that Hispanics were not part of the “We” that is at the core of US cultural, religious, linguistic, and racial identity. Latino/as remain too exotic, Catholic, culturally unassimilated and unassimilatable1. Among the many important signals and symbols of national acceptance, of having won national recognition, and being included among those who can say “We”, being on the Supreme Court is surely the most important. And I think this is as it should be. The Supreme Court is to a nation, what the Kantian “I” is to the Modern moral subject: the metonym for the will and capacity to rule oneself in accordance with the law, law that is discerned by the light of one’s reason. There are some glitches in the analogy, however. While the Kantian “I” is the autonomous rationally willing self, the Supreme Court is made up of nine Justice, all representing different backgrounds, appointed also for political reasons and to judge in accordance with a judicial philosophy that advances one or another view about the constitution. Still, the Supreme Court stands for the commitment to be ruled by laws, and not by men, and to live under the rule of law by the lights of our own reason as it is formed through public deliberation.

Above the sixteen marble columns that support the architrave of the west entrance to the Supreme Court’s building are carved unadorned four resounding words: “EQUAL JUSTICE UNDER LAW”. The words are in clear and plain font English-- not Latin, not Greek, not Hebrew, not any of the so-called holy languages. The building is set atop marble steps and it is crowned by a frieze that is reminiscent of a Greek temple. We ascend the steps towards justice, with our eyes fixed on those unambiguous words: “EQUAL” –we all are; “JUSTICE”—we all deserve it and can claim it; “UNDER” –we dwell as citizens under a moral and legal canopy created by humans, as mortals dwell under the heaven with its supreme legislator, the all benign and just God; “LAW” –law, not force, not fiat, not privilege, one made by humans, lawyers, justices, and not gods, churches, parties, or oligarchies. Walking up those steps, as I have, gives one chills to think of what that means: that we live under a government in which the laws are made by other human beings, human beings who like all of us, have personal, family, ethnic, and racial histories, but that when they deliberate about how to interpret the constitution, and thus all the powers of the braches, they do so in a definitive and generative way. When the Supreme Court rules, the “legitimacy” of the law of the land is spoken. The Supreme Court then rules on

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whether the laws that Congress makes are both “legal” and “legitimate.” In this way, the law of the land is always under scrutiny. The law is made, not received; it is also revisable and revocable, because it may be “unjust.” The law is perfectible, though never perfect. Yet, the coevalness and co-equality of the Supreme Court was not always this clear and evident. When Washington was designed to be the capital of the new republic, the Capitol and the White House were in the original designs. The Supreme Court, however, was not assigned a building. It was not until 1935 that the Court was granted its own building by Congress, 146 years after its establishment.

Over the duration of its co-evolution with the other branches, the Supreme Court has also learned about its powers and limits. Above all, since its first Chief Justice John Marshall, the Court has been educated about its distinct power of “judicial review,” a power that is inchoate, but not explicitly articulated in the Constitution, and this is the power to review the Constitutionality of the laws made by Congress. Over its two hundred and twenty year existence, the Justices that have made up the court have ruled on how to read the Constitution, and in the process they have taught the two other powers that the Constitution is an unfinished foundational document. The education of the Court about its powers and limits, has been above all an education about how the “Constitution” is a foundational document that has to be read and re-read in ever more expansive ways to be able to address the ever changing legal, political, and civic needs of one of the most sophisticated polities ever to have existed. The Justices are not just interpreters of the Constitution, they are also supreme legal philosophers who aim to decipher and generate new meanings of civil freedom and legal constraint at the core of that Constitution. In this sense, the power of the Justices is not jurisgenerative, but it is also freedom generative. Justice Stephen Breyer has given a name to that freedom that is at the heart of the Constitution and that Justices ceaselessly exegete into existence, “active liberty.” For this reason, the struggles for the soul or heart of the Supreme Court are key strategic struggles in the overall fight over for the idea of the United States as the story of the struggle for freedom, freedom as a form of civic liberty. The struggles over the Supreme Court are struggles over how to shape the grand recit of the United States, and more specifically, about who is the “we” that makes that history, and who can and cannot be included in it. It is for this reason that the Supreme Court has had such a profound impact on how we understand the “We” in the “We the People,” and the “We” of “Under Law” that is written in stone over the marble steps that ascend to the house of justice in this land.

When Andrew P. Napolitano, the youngest Supreme Court Justice of the State of New Jersey (for full disclosure I should note that I grew up in New Jersey and received my B.A from Rutgers, the State University of New Jersey), titled his impressive “legal history of race and freedom in America,” Dred Scott’s Revenge, he put his finger on the cardinal point where both the history of the U.S., writ large, and the history of law, both pivot to either exclude or include from the “We” of the “We the People.” Dred Scott was about slavery, but it was also about who is a citizen, and who may claim “due protection” “UNDER LAW”. Napolitano has given us a powerful way to understand the way in which citizens have made government, literally, by challenging attempts to read the Constitution in ways that denies them equal protection under the law. More specifically, Napolitano is urging us to see how the Supreme Court over the last half a

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century, has been on the side of this particular way of understanding our Constitution, the power of Congress, and the freedom generative powers of the Court itself. Dred Scott won, in the long run, because too many of us were at one point Dred Scotts—former Slaves, women, Mexicans, American Indians, the criminalized poor, the targeted ghetto dwellers, black Latinos, Puerto Ricans, gays, alleged terrorists—and had we all been denied our rights as citizens, this our government would not be a government of humans under law, but a government of a racial oligarchy under their fiat.

For a long time the Supreme Court appeared to be precisely that, a racial oligarchy, until the middle of the 20th century, when Jews and Catholics began to be nominated and confirmed to the Supreme Court. It is amazing that in the last few decades women, Black men, Jews, Italian-Americans, and Catholics have been confirmed to the Supreme Court. Thurgood Marshall was the first black Justice, and Sandra Day O’Connor as the first woman. Such appointments were ground breaking. The nominees and confirmations became role models but also alibis for those willing to take a risk on the untried minority. Marshall and O’Connor were appointed during a period when the Court was a defender and advocate of the idea that our constitution is as incomplete as we remain an unfinished nation. Today, regrettably and sadly, we face a court that has been stacked with some of the most belligerent, conservative, duplicitous and ‘activist’ judges ever to sit at the bench since the Southern packed courts of the mid 19th century when the country was dealing with the aftermath of the abolition of slavery. As the country has moved to the left politically, the Court has been moved to the right by several Republic appointments. The catchwords of legal constructivism, humility, moderation, and deference to stare decisis (primacy of precedence), and pragmatism have become euphemisms for the kind of legal philosophy that in its indeterminancy allows for Justices to decide cases on ad hoc ways against the preservation of the power of citizens. The shift towards an emboldened legal conservatism, with its wide spectrum of views from Rehnquist and Roberts on one end to Scalia and Thomas on the other, has been over the last two decades rolling back the advances of the Warren court shielded by the vague ideology of judicial restraint. As Jeffrey Toobin put it in a recent article on Justice Roberts, it was during the Warren’s court presiding that the Justices “expanded civil-rights protections for minorities, established new barriers between church and state, and, most famously, recognized a constitutional right to abortion.” This period was, continued Toobin, “in Roberts’ telling, the bad old days.”

Roberts has become the de-facto leader of a conservative Supreme Court Phalanx, to use the expression by Ronald Dworkin’, which is made up of Justices Scalia, Thomas, Alito, and Roberts, with Kennedy joining on key decisions. Over the last couple of years, the Roberts court has delivered a spate of 5-4 decisions, in which these Justices have voted together, mostly to strike down many of the decisions made during the Warren and even Rehnquist courts, rolling back the ‘bad old days’ of protecting the rights of the strong against the weak, the marginalized and discriminated against intolerant majorities, and the rights of woman to decide about their own bodily autonomy without intervention from the State, Church, or a male authority.

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5 For an analysis of the decisions delivered by the Roberts court, see Dworkin’s book The Supreme Court Phalanx, especially the last chapter.
This phalanx, which is not “guided in its zeal by some conservative judicial or political ideology of principle. It seems guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance,” will surely decide most of the decisions the Court will make over the next couple of decades. Roberts is in his early fifties. Still, the Court belongs to the nation, and above all to the citizens of the republic. They are the voice of constitutional reason. Whether the Constitution is read expansively and in accordance with the civic needs of the polity, or is mummified and ossified by a judicial philosophy of alleged restraint masking a conservative activism, depends on the ability of Justices to be in tune with the needs of the polity. This ability to listen and consider the needs of the polity is what Jeffrey Rosen has called “judicial temperament.” In Dworkin’s assessment, the judicial temperament guiding the present court is one bent on subverting the jurisgenerative and freedom generative powers of the Court, and most importantly, on subverting the American Constitution. When the Court abandons its role as defender and creative reader of the Constitution, it betrays its own history, one that has been about educating itself about its ability to keep our founding document open so that our democracy is one not perfect but perfectible. When Justices betray this powerful history, they are betraying their co-citizens, who look up to that building and their inhabitants, as the supreme embodiment of their own struggles to make the history of this country the history of struggle for and achieved inclusion. Sonia Sotomayor is likely to be confirmed. Not to confirm her would be political suicide for the Republicans. It would be a slap in the face not just to Latinos, but also women, were they to filibuster and block her confirmation. She will join the Court to essentially to take over the vote that Souter has represented since his confirmation. The balance, however, is still tilted towards the right. She will bring to the Court precisely that kind of judicial insight and empathy that President Obama saw lacking in Roberts when as a member of the Senate he voted against his confirmation. In that speech Obama said: “It is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak.” With Sotomayor, we will have a skilled and experienced legal mind that more likely than not will side with citizens against the power of the state, big money, and religious and racial intolerance. Her presence and extensive court experience will make her a powerful voice in the Court. More 5-4 decisions are sure to follow. But many of them will be harder to procure. Her work will be indispensable in saving the Court’s heart for the Constitution through which we all should speak as “We the people.” Yet, for many Latinos/as Sotomayor the Supreme Court Justice, will mean that we are part of that “We the people.” The story of freedom that is this country is now also our history. This history will make claims us and we will make claims on it. Our nation has become stronger, a political jewel to behold, when its “We” has become more inclusive, and its loyalty more sincere, and when those that make up the “We the People” can live without fear with “EQUAL JUSTICE UNDER LAW.”

6 Dworkin, The Supreme Court Phalanx, 47-48.